UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
WASHINGTON, D.C. 20001

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Date: 12/01/97

Case No.: **96 INA 165**

In the Matter of:

LCD LIGHTING, INC.,
Employer,

on behalf of

DOROTA BAJOR,
Alien

Appearance: J. E. Coven, Esq., of New York, New York

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of DOROTA BAJOR (Alien) by LCD LIGHTING, INC., (Employer) under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at Boston, Massachusetts, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

at the place where the alien is to perform the work: (1) there are not sufficient workers in the United'States who are able, willing, qualified, and available at that time and place; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On May 31, 1994, the Employer applied for alien labor certification to enable the Alien to fill the position of "Laboratory Technician, Fluorescent Lighting." AF 137. The pay rate for this forty hour a week job was $12.36 per hour with no provision for overtime service. The job was classified as Electronics Tester under DOT Occupational Code 726.261-018, based on Employer's amendments to the job description. AF 121-131. Although thirteen U. S. workers applied for the position, the Employer rejected all candidates. AF 44-75, 81-114.

Notice of Findings. The September 11, 1995, Notice of Findings (NOF) stated that, subject to Employer's rebuttal, alien labor certification would be denied for several reasons. (1) The CO cited 20 CFR § 656.21(b)(3)(ii) and found that Employer did not comply with 20 CFR § 656.21(b)(10) by posting notice of the job in a conspicuous place for at least ten days. (2) Citing 20 CFR §§ 656.21(b)(6) and (7), the CO required Employer to establish that its rejection of U. S. workers were for reasons that were lawful and job-related, and that it had not hired workers with less training or experience for this or similar positions than it required in Part 13 of its application. (3) Questioning the Alien's qualifications for the position at issue, the CO cited 20 CFR §§ 656.21(b)(6), 656.3[2], and 656.21(b)(2)(i)(A), (B), and (C), finding that the Alien's experience was acquired while working for the Employer. (4) The CO cited 20 CFR § 656.21 (b)(6) in finding that the required qualifications for the job are the actual minimum requirements to perform the work, and that the Empoyer has not hired less well qualified workers than its job offer specified. In each instance the CO specified the evidence necessary to rebut the findings on which these deficiencies were based. AF 38-43.

Rebuttal. Employer's rebuttal to the NOF consisted of a letter from its attorney, dated October 16, 1995, and several attachments. AF 15-37. Employer offered evidence and argument on all of the deficiencies discussed in the NOF.

Final Determination. The CO issued a Final Determination denying certification on December 6, 1995. AF 12-14. As the only

[2]§ 656.50 has been recodified as § 656.3, a definition of "employment."

deficiency discussed by the CO was Employer's failure to comply with 20 CFR § 656.21(b)(6)[3], it is inferred that the Employer's rebuttal satisfactorily explained all of other defects the CO reported in the NOF and that this is the only issue before the panel.[4] After a detailed review of the Employer's rebuttal evidence, the CO found that the Alien had gained the requisite experience while working for the Employer in the job offered in Part 13 of its application. Reasoning that the Employer's hiring qualification that U. S. applicants have two years of experience in the position when the Employer previously hired the Alien without applying the same criterion is inherently adverse to U. S. workers, the CO denied certification because such a requirement is clearly contrary to 20 CFR § 656.21(b)(6).

Appeal. After the CO denied certification, the Employer appealed on January 9, 1996. AF 01-03.

Discussion

The finding at issue relates to the Alien's statement that she qualified for the job offered with two years of work as a laboratory technician for Light Sources, Inc., from January 1990 to January 1992. AF 13, and see AF 140, Item 15b. Noting her additions to Item 15 on October 5, 1994, the CO said it appeared that the Alien had, in fact, acquired the necessary experience while working for the Employer, LCD Lighting, Inc., ("LCD" or "Employer") in spite of her employment by Light Sources, Inc. ("Light Sources"). The CO required convincing proof that the two companies are different and not actually the same employers, including but not limited to the Articles of Incorporation and identities of the major shoreholders of both companies, and the identification of the corporate officers of both companies with their respective financial interests duties and responsibilities.

As the Board explained in **MMMats, Inc.**, 87 INA 540(Nov. 24, 1987),

> The general rule is that labor certification will be denied under § 656.21(b)(6) when the alien has been employed in the position for which certification is sought and has gained experience which is required by the job offer while working for the employer in that position. The exception requires the employer to document that it is now not feasible to hire

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[3]20 CFR § 656.21(b)(6) requires the Employer to show that its hiring qualifications do not exceed its actual minimum requirements for the position, that it has not hired workers whose training or experience is less than it demands of new applicants, or that it is not feasible to hire workers who are less well qualified than the job offer requires.

[4]See **Barbara Harris**, 88 INA 392(Apr. 5, 1989)(en banc).

workers with less training or experience than that required by the employer's job offer.

Although the Employer admitted the common ownership of both companies, it failed to submit any documentation to prove the existence of operational independence. The record does not contain the Articles of Incorporation or lists of major shareholders of the respective companies that the CO directed Employer to file. Instead, the Employer relied entirely on the affidavit of its employee, Mr. Manton, to prove the necessary facts. While he is employed by Light Sources, Mr. Manton's personnel duties include the hiring and firing of employees for both Light Sources and LCD. He reports directly to the sole shareholders and corporate officers of both companies, Christian Sauska and George Csoknya.[5] On the date of application, Light Sources, which is located at 70 Cascade Boulevard in New Milford, Connecticut, had been in business about twelve years, and LCD, which is located at 70 Cascade Boulevard, had been in business about five years. The older company manufactures commercial fluorescent lighting, and LCD engages in research and development of instrument lighting and measurement devises and instruments for other industries. Mr. Manton said that that these two companies "are treated as completely different legal entities" and that "a person would not be shifted from one company to the other." In spite of this reservation, his affidavit leaves no doubt that there is a clear identity of management and control as between the companies, and that the intermingling or exchange of personnel is not prevented by any consideration except the owners' convenience and the vocational abilities of the workers, themselves.[6] In view of this identity of ownership and of personnel and operational management of the two companies, the Employer's admission through Mr. Manton is clearly supported by the evidence of record.

Even if the Employer's evidence was persuasive that these two corporations have separate identities, this alone would not

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[5]Mr. Sauska owns eighty per cent and Mr. Csoknya owns twenty per cent of each of the respective corporate entities.

[6]The argument in Employer's brief included assertions of fact that have been ignored because (1) they were stated by the attorney and are not supported by any evidence of record. **Moda Linea, Inc.**, 90 INA 424 (Dec. 11, 1991), and (2) they were not placed before the CO in its rebuttal. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992). The Board reiterated in **Schroeder Brothers Co.**, 91 INA 324 (Aug. 26, 1992), that evidence not previously submitted cannot be presented after the Final Determination, citing **Harry Tancredi**, 88 INA 441(Dec. 1, 1988)(en banc). In **Magic Windows, Inc,** 92 INA 250(Feb. 3, 1994), the Board cited and explained 20 CFR §§ 656.26 and 656.27, which limit the scope of BALCA appeal to review of the evidence that was in the record on which denial of certification was based.

alter the result in this case, however. The Alien's two years of experience with Light Sources did not include all of the skills required to perform her job at LCD. As the Employer drew a careful distinction between the expertise she acquired while employed in the more elementary operations of Light Sources and the finer level of functions that she later performed at LCD, it is reasoned that her improved skills were due to either training or experience, and that her new vocational capacity was important to qualify her at LCD when she was hired for the job described in Part 13 of the application. The statements of Mr. Manton and of Mr. Sporre provided this dichotomous delineation but failed to account for the requisite increase in the Alien's skills between the time she was hired as an employee of Light Sources and the time of hiring by its sister company, LCD.[7] In the absence of credible evidence of record that otherwise accounts for this increase in the vocational capacity of the Alien, it is inferred that she learned the skills necessary to the position at issue when she was worked for the Employer and not while employed by Light Sources. The alternative premise is that her work for LCD requires no more skill than her work for Light Sources, which is contradicted by the statements of Mr. Manton and Mr. Corwin.

As the position at issue requires two years of experience in the Job Offered, it is found that the Employer has demonstrated that the ownership, management, and control of Light Sources and LCD is identitcal, and that this identity explicitly controls whether or not the personnel and operations of the two business entities are intermingled at the convenience of their owners. Moreover, as the evidence of record does not account for the Alien's increase in skills when she moved from her employment by Light Sources to the position at issue with LCD, it is inferred that she learned how to do this job while working for LCD.

While the exception to 20 CFR § 656.21(b)(6) that the Board noted in **MMMats, Inc.**, supra, is discussed in Employer's brief, this exception requires the employer to document that it is not feasible to hire workers with less training or experience than that required by the job offer. First, that if Employer wanted a worker with the lesser skills appropriate to the manufacturing operations of Light Sources, the owners of the two firms could move an existing employee from LCD's payroll do the job. If that was the solution, LCD would have employed a worker with less training or experience than it says the job offered requires. This is not the case, however. The assumption by Employer's brief is that the Alien did not bring from Light Sources the skills needed to do the new job at LCD and she required training that she was given at LCD. Employer's record does not contain

[7]When their identity of ownership and control is considered, it is difficult to avoid calling these two firms fraternal siblings, if not identical twins.

persuasive evidence that demonstrates that it was not feasible to train the U. S. workers it might hire for this job with the same skills as the Alien had when LDC hired her away from Light Sources. As an eminent Connecticut trial judge once remarked in comparable circumstances, "Bald statements need to be covered with some evidential hair in this situation to be judicially acceptable." **Connecticut Natural Gas Corp. v. P.U.C.**, 29 Conn. Sup. 379, 394 (1971).

The Employer's evidence does not support its contention that it is not feasible to give a U. S. worker the same training that it gave the Alien when it hired her, and it is concluded that the Employer did not sustain its burden of proof as to this issue.

Because we find that the CO's denial of certification was suppor-ted by sufficient evidence, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

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Sheila Smith, Legal Technician

BALCA VOTE SHEET

Case No.: 96 INA 165

LCD LIGHTING, INC., Employer,
DOROTA BAJOR, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: June 24, 1997